

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1107

Sovereign Immunity

SPONSOR(S): Nehr

TIED BILLS:

IDEN./SIM. BILLS: SB 2060

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		De La Paz	De La Paz
2)	Full Appropriations Council on Education & Economic Development			
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Currently, legislative approval is required before subdivisions of the state may settle and pay tort claims in excess of the liability limits provided in statute. The one exception to this requirement is when the subdivision has insurance to cover such claims, in which case the statute authorizes the settlement and payment of claims up to the limits of the policy coverage.

HB 1107, amends section 768.28(5), F.S. effective July 1, 2010, to authorize a subdivision of the state to settle and pay tort claims from insurance proceeds or other available funds without requiring a further act of the Legislature. In effect, the bill would allow local governments to pay claims above the current \$100,000/\$200,000 statutory limit regardless of insurance coverage, insurance policy limits, or the lack of a commercial insurance policy.

Effective July 1, 2011, the bill increases the limits of liability against the state, its agencies and subdivisions from \$100,000 per individual claim and \$200,000 per aggregate claims, to \$250,000 per claim or judgment by any one person. Effective July 1, 2012, and annually on July 1 of each succeeding year, the \$250,000 limit must be adjusted to reflect changes in the Consumer Price Index.

Under the bill, if a subdivision does not agree to pay that portion of a judgment exceeding the statutory limits of liability, in whole or in part, that portion of the excess judgment may be reported to the Legislature, but may be paid only by further act of the Legislature.

The fiscal impact on this bill on state and local governments is indeterminate.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Sovereign immunity**

Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted a limited waiver of sovereign immunity in section 768.28, F.S. This section provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by statutory definition includes the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.<sup>1</sup> Liability does not include punitive damages<sup>2</sup> or interest for the period before judgment.<sup>3</sup>

The statute imposes a \$100,000 limit per person, and a \$200,000 limit per incident, on the collectability of any tort judgment based on the government's liability. These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap, however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Florida law requires a claimant to petition the Legislature in accordance with its rules to seek an appropriation from state funds to pay a judgment against the state or a state agency.<sup>4</sup> Subdivisions of the state pay their claims out their own respective budgets and the provisions of section 768.28, F.S., operate to require the Legislature's approval of the expenditure of the subdivision's own funds to pay their claims. In fact, the legislative appropriation (for

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<sup>1</sup> Section 768.28(2), F.S.

<sup>2</sup> Punitive damages are distinguished from compensatory damages in that punitive damages are intended to punish the defendant for a wrong aggravated by violence, malice, fraud, or wanton or wicked conduct on the part of the defendant. Black's Law Dictionary (5<sup>th</sup> Edition 1979). In Florida, a non-government defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. Section 768.72, F.S.

<sup>3</sup> Section 768.28(5), F.S.

<sup>4</sup> Section 11.066, F.S.

state claims) or approval (for subdivision claims) is the sole method to compensate a tort claimant in an amount that exceeds the caps, and such act is considered a matter of legislative grace.<sup>5</sup> The means the Legislature has provided to seek such an appropriation is through the filing of claim bills.<sup>6</sup>

Section 768.28(9)(a), F.S., provides that the exclusive remedy for injury or damage suffered by an act, event, or omission of a government employee acting within the course and scope of their employment is by action against the governmental entity, unless such act was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Notwithstanding the limited waiver of sovereign immunity provided by statute, the government may agree, up to the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action of the Legislature, but the government shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of obtaining insurance coverage for tortuous acts in excess of the statutory caps.<sup>7</sup> In this respect, the current law treats the state's ability to pay and settle claims, and a state subdivision's ability to pay and settle claims, in an identical manner.

### **Attorneys Fees in Claims Against Government Entities**

Under section 768.28(8), F.S., an attorney may not charge fees for services rendered which are more than 25% of any judgment or settlement against the state or any subdivision. No provision is made for additional services rendered in connection with appellate proceedings or other actions required subsequent to the entry of the judgment or settlement for recovery of the judgment or settlement.

### **Effect of HB 1107**

HB 1107, amends section 768.28(5), F.S., effective July 1, 2010, to authorize a subdivision of the state to settle and pay claims from insurance proceeds or other available funds without requiring a further act of the Legislature. In effect, the bill would allow local governments to pay claims above the \$100,000/\$200,000 statutory limit regardless of insurance coverage, insurance policy limits, or the lack of a commercial insurance policy.<sup>8</sup>

Under the bill, the fact that a subdivision agreed to settle or pay a judgment exceeding the statutory limits of section 775.028(5), F.S., does not amount to a waiver of any defense of sovereign immunity or to an increase in the limits of its liability.

Under the bill, if a subdivision does not agree to pay that portion of a judgment exceeding the statutory limits of liability, in whole or in part, that portion of the excess judgment may be reported to the Legislature, but may be paid only by further act of the Legislature.

HB 1107, also amends section 768.28(5), F.S., effective July 1, 2011, to increase the limits of liability against the state, its agencies and subdivisions from \$100,000 per individual claim and \$200,000 per aggregate claims, to \$250,000 per claim or judgment by any one person. Effective July 1, 2012, and annually on July 1 of each succeeding year, the \$250,000 limit must be adjusted to reflect the average change in the Consumer Price Index for all urban consumers and to reflect the change in the medical care component of the Consumer Price Index for all urban consumers, issued by the Bureau of Labor Statistics of the U.S. Department of Labor for the preceding calendar year.

HB 1107 also amends section 768.28(8), F.S., to authorize an additional charge for attorney's fees, in an amount of 5 % of any recovery, after an appeal is filed or after postjudgment or postsettlement action is required to recover on the judgment or settlement. With respect to the legislative claims

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<sup>5</sup> See, Gamble v. Wells, 450 So.2d 850 (Fla. 1984).

<sup>6</sup> A claim bill is a bill that seeks to compensate a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

<sup>7</sup> Section 768.28(5) F.S.

<sup>8</sup> Some counties and municipalities self-insure against such claims.

process, and the fact that it requires postjudgment or postsettlement action, no statutory change to this section would bind future legislative acts concerning attorney's fees with respect to claims bills passed by the Legislature.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 768.28(5), F.S., effective July 1, 2010, authorizing state subdivisions to settle and pay claims exceeding the statutory liability limits without further legislative act.

Section 2. Amends s. 768.28(5), F.S., to increase the liability limit against the state, its agencies and subdivisions beginning in 2011 and annually thereafter.

Section 3. Providing an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

Indeterminate. See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

Indeterminate. See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The fiscal impact of this bill with respect to that portion of the bill authorizing subdivisions of the state to settle or pay claims above the liability limits without legislative approval would depend on the number of claim bills filed in which local governments agree to settle and pay such claims. Additionally, it is possible insurance rates for claims coverage will be raised in response to the increased direct control that local governments will have in deciding whether to pay claims in excess of the statutory liability limits.

HB 1107's fiscal impact with respect to that portion of the bill increasing the liability limits of state and local governments from \$100,000/\$200,000 to \$250,000, subject to annual increases thereafter, is indeterminate. The increased cost will depend on the number of claims filed in an amount greater than the current limits but lower than the limits proposed under the bill. From 2009 through 2004 only 2 two claim bills were filed over the amount of the current cap but under the amount of the bill's proposed cap. In 2003, however, there were nine such bills. In 2002, there were six such bills and in 2001, there were seven bills.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 3. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill's amendment to subsection (5) of 768.28, F.S., effective July 1, 2010, could be construed to allow stacking of liability limits in cases involving joint claims against the state and a subdivision. The deletion of all references to "subdivision" in the bill's newly created paragraph (5)(a) effectively limits the aggregate amount of multiple claims to only those claims against the state and its agencies to \$200,000. The bill's newly created paragraph (5)(b) addresses only the aggregate limit of multiple claims solely against a single subdivision to \$200,000. Without an express prohibition against the stacking of claims involving joint actions against the state and a subdivision, the bill could in effect double the liability limit of aggregate claims. A single incident resulting in multiple claims against the state and a subdivision would carry an aggregate limit under current law of \$200,000. Under the bill, such a scenario would result in an aggregate limit of \$400,000 - \$200,000 for the state and a separate \$200,000 aggregate limit for the subdivision.

With respect to the changes made to this subsection effective 2011, there is no longer an "aggregate" limit, however, individual claims could be stacked by filing an individual suit against a local government and against the state arising out of the same episode.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES